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Ratios, (Ir)rationality & Civil Rights Punitive Awards

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RATIOS, (IR)RATIONALITY & CIVIL RIGHTS PUNITIVE AWARDS

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I. INTRODUCTION

In the charged atmosphere of tort reform and in the wake of the Supreme Court's federalization of due process challenges to punitive awards, litigants, lower courts, and commentators grapple with the interpretation and import of Supreme Court remedial due process precedent. The Supreme Court's seminal precedents in this area, *BMW v. Gore*[1] and *State Farm*,[2] enshrine three guideposts for review of the constitutionality of punitive damage awards. The guideposts are: (i) the degree of *reprehensibility* of defendant's conduct, (ii) the *ratio* between actual or potential harm (which often translates into the compensatory award) and the punitive damage award, and (iii) the *disparity* between the punitive award and the sanctions available for comparable conduct.[3] The ratio prong and its corresponding jurisprudence provide heavy artillery for defendants seeking to invalidate or substantially reduce punitive awards. Such precedent constitutes a powerful example of judicial tort reform that inures to the benefit of defendants. The case law in this arena vividly demonstrates that "the Court has shown that it will aggressively police punitive damage awards, principally through the rubric of the Due Process Clause."[4] When the Supreme Court

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1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).
2. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).
3. *Gore*, 517 U.S. at 575.
4. Michael P. Allen, *The Supreme Court, Punitive Damages & State Sovereignty*, 13 GEO.

pronounces in *State Farm* that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process" and that it is obvious that "[s]ingle-digit multipliers are more likely to comport with due process,"[5] it should come as no surprise that defendants of all stripes unsheathe this language as a sword to eviscerate jury verdicts on punitive damages.[6]

For traditional tort cases with pecuniary harms, judicial and legislative tort reform might rein in excessive jury verdicts.[7] But an examination of tort reform requires an inquiry into whether a chosen reform is the right antidote for all cases in which the reform will apply. Should 'one size fit all'? Here, the Supreme Court's judicial reform, the three guideposts, applies not only to state and federal traditional tort cases, but also to constitutional torts and statutory civil rights cases. In the latter set of cases, it is more common that nonpecuniary harms are at issue. Accordingly, it is often difficult to commodify the value of such harms, and thus, juries in civil rights cases may award only nominal or very low damages for plaintiff's actual harm. This article will focus on the effect of the Court's tightening of the ratio prong on federal civil rights cases. In particular, it addresses whether federal appellate courts feel constrained by *State Farm*'s stated preference for single-digit ratios, or instead, jettison the ratio strictures in favor of other prongs.

Although the Supreme Court issued a reminder that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct[,]"[8] the Court did not explicitly state that courts could altogether disregard the ratio factor in fitting circumstances. In dictum, the Court acknowledged that "ratios greater than those we have previously upheld may comport with

MASON L. REV. 1, 10 (2004) (arguing that the Court incorrectly places independent reliance on state sovereignty and concluding that extraterritorial conduct should be permissible evidence of the totality of defendant's conduct).

5. *State Farm*, 538 U.S. at 425.

6. Moreover, tort reform advocates further appreciate the Court's endorsement of a 1:1 ratio in certain circumstances, *i.e.*, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

7. Whether the *Gore/State Farm* three-guidepost mechanism is the most effective form of tort reform for its broader arena of application in traditional torts with pecuniary harms is beyond the scope of the instant article. This article focuses on the mismatch of the ratio prong to constitutional torts and civil rights cases in particular. The criticism raised may have implications, however, applicable to the broader arena. For manageability in this Symposium piece, this article focuses on federal courts grappling with the ratio guideline in the civil rights context. Certainly, state courts are contributing to the development of this body of law and are worthy of exploration in a separate piece.

8. *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575).

due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"[9] The Court's continued assertion that it rejects "rigid benchmarks" and "bright-line ratio[s]"[10] cannot mask *State Farm*'s "swift conversion of those guides into instructions that begin to resemble marching orders."[11] Despite the strong temptation for courts to follow the Court's "numerical controls" and fall in line with its preferred methodology,[12] some courts, in garden-variety torts, have subordinated the *Gore/State Farm* ratio test to the reprehensibility prong.[13] Significantly, prior to the enunciation of the *Gore/State Farm* guideposts, Professor Dan Dobbs suggested that there is an inherent inconsistency between the ratio and reprehensibility factors in reviewing punitive damage awards.[14]

Civil rights violations demonstrate the problematic nature of strict adherence to the Court's ratio test. In *City of Riverside v. Rivera*,[15] the Supreme Court emphasized the vital nature of the private and public interests at stake in civil rights cases and the importance of statutory incentives leading aggrieved parties to bring civil rights actions.[16]

9. *Id.* at 425 (citing *Gore,* 517 U.S. at 582). The Court parenthetically noted that a higher ratio "*might*" be warranted for harms that are hard to detect or valuate, but did not provide examples. *Id.*

10. *State Farm*, 538 U.S. at 425; *see also Gore*, 517 U.S. at 582-83 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.") (internal quotations and citations omitted) (brackets and ellipses in original).

11. *State Farm*, 538 U.S. at 439 (Ginsburg, J., dissenting) (declining to join the Court's transmogrification, even assuming the guideposts were acceptable in the first instance).

12. *Id.* at 438 (Ginsburg, J., dissenting).

13. *See*, *e.g.*, Willow Inn v. Public Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir. 2005) (affirming a 75:1 ratio – $150,000 punitive award where compensatory damages were $2,000 – because "the relationship between punitive and compensatory damages [was] reasonable given the degree of reprehensibility"); Mathias v. Accor Econ. Lodging, 347 F.3d 672, 676 (7th Cir. 2003) (affirming a 37:1 ratio – $186,000 punitive award where compensatory damages were $5,000 on a per plaintiff basis – because "punitive damages should be proportional to the wrongfulness of the defendant's actions").

14. *See* DAN B. DOBBS, LAW OF REMEDIES § 3.11(11), at 519 (2d ed., vol. 1, practitioner treatise series 1993) ("Even as a guideline or a 'factor' to be considered along with others, the ratio rule has little to recommend it. It is in direct conflict with the punitive purpose of the award, which requires . . . the award to be proportioned to the defendant's evil attitude and serious misconduct[.]") (citing *inter alia* Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1181 (1931) ("instancing a hunter who fires into a crowd of people but only breaks a ten dollar pair of glasses; the admonition of punishment clearly should exceed the $10 figure or any likely multiple of that figure")).

15. 477 U.S. 561 (1986).

16. *See id.* at 574 ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms"); *see also* Carey v. Piphus, 435 U.S. 247, 266 (1978).

Current case law and precedential trends demonstrate that courts are struggling with how to implement and fulfill the policies supporting private rights of action for civil rights violations while faithfully interpreting the Supreme Court's precedent on remedial due process limits. The problems are two-fold in civil rights line of cases: (1) some federal circuit courts bar punitive damages if there are no compensatory damages; and (2) courts reviewing a punitive award where compensatory damages exist may feel compelled to apply rigidly a single-digit ratio to comport with *State Farm*. Barring or severely limiting punitive damages – whether on the basis of nonexistent compensatory damages or a dogmatic application of *State Farm* – does not comport with the typical world of civil rights violations. For many civil rights plaintiffs, immunity barriers may foreclose any recovery.[17] For cases where the plaintiff survives an immunity barrier or where none applies, legal damages may still remain elusive. Despite the high dignitary interests at stake and high public interest in enunciation of standards and vindicating rights, civil rights cases often involve low provable compensatory harm.

So, what do courts do in the face of this mismatch? Many find a way out. Regarding general application of the ratio test, more than eighty cases applied *State Farm* during its first year on the books.[18] More than eighty percent of those courts restricted punitive damages to nine-to-one or less (*i.e.*, single-digit ratios).[19] This article's review of the federal appellate civil rights cases that examined a challenge to a punitive award and addressed the ratio prong post *State Farm* yields mixed results.[20] These courts struggled to apply the *Gore/State Farm* ratio principle in the civil rights context – some courts remained at single digits, some reduced awards to single digits, some upheld multiple digits, and still others escape simple categorization. The review reveals

17. *See*, *e.g.*, Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1358 (2002) (emphasizing that most Establishment Clause plaintiffs do not overcome immunity hurdles) [hereinafter Rendleman, *Irreparability Resurrected*]; *Rivera*, 477 U.S. at 577 (quoting legislative history regarding § 1988 for the proposition that "it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy*").

18. Samuel A. Thumma, *Post-*'Campbell' *Cases*, NAT'L L.J., June 7, 2004, at 13.

19. *Id.*

20. *See* Appendix for a chart of the twenty-one federal appellate cases grappling with *State Farm*'s ratio principles. The chart summarizes the civil rights claim at issue, the factfinder ratio, remittitur, the appellate ratio, and the appellate court's rationale. As of February 1, 2006, these are the universe of federal appellate cases citing to *State Farm* that assess punitive awards under the ratio guideline.

less than predictable results. Thirteen civil rights cases addressed circumstances in which the ratio already comported with a single-digit framework.[21]

Five civil rights cases reduced a multiple-digit award to a single-digit.[22] In one of these cases, *Planned Parenthood v. American Coalition of Life Activists*,[23] complexity arose in determining what figures constituted the appropriate benchmarks of compensatory damage and punitive damage for the purposes of a ratio analysis. The case involved multiple plaintiffs and multiple defendants. The defendants preferred a lump sum comparison of total compensatories to total punitives.[24] The district court rejected this theory and viewed punitive damages per each defendant, but compensatories in aggregate.[25] This yielded ratios of 31.8:1, 15.2:1, 9.5:1 and 6.6:1.[26] The Ninth Circuit carved a new formulation to match each plaintiff's individual compensatory award to the punitive award assessed against each defendant.[27] This formulation yielded ratios ranging from 56.7:1 to 12.6:1.[28] Then, in the name of *State Farm*, the court determined that none of the awards should exceed a 9:1 ratio.[29]

Notwithstanding the Supreme Court jurisprudence favoring single digits, which the Ninth Circuit called the "constitutional limit,"[30] other

21. *See*, *e.g.*, Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding a punitive award of $2.6 million for a racial discrimination claim under § 1981 as not excessive in light of a $360,000 compensatory award that created a constitutionally permissible ratio of 7:1); Bogle v. McClure, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding a 4:1 ratio in a § 1981 racial discrimination case where each of the seven plaintiffs received a $500,000 compensatory award with approximately a $2,000,000 punitive award). Notably, the *Zhang* court emphasized that a substantial punitive damage award – $2.6 million in favor of a Chinese employee – should survive in the § 1981 discrimination case because "the reprehensibility of the fraudulent business practices at issue in [*Gore* and *State Farm*] is different in kind from the reprehensibility of intentional discrimination on the basis of race or ethnicity" and "intentional discrimination is a different kind of harm, a serious affront to personal liberties." *Zhang*, 339 F.3d at 1043.

22. *See*, *e.g.*, Bains LLC v. ARCO Prod. Co., 405 F.3d 764, 776 (9th Cir. 2005) (requiring a maximum of a 9:1 ratio where the jury award resulted in either a 100:1 ratio, including a contract claim, or a 5,000,000:1 ratio when analyzing the § 1981 claim alone); Williams v. ConAgra Poultry Co., 378 F.3d 790, 796 (8th Cir. 2004) (reducing a hostile environment award from 10:1 to 1:1, $600,000 each for punitive and compensatory damages).

23. Planned Parenthood v. Am. Coalition of Life Activists, 422 F.3d 949 (9th Cir. 2005).

24. *Id.* at 960.

25. *Id.* at 960-61.

26. *Id.*

27. *Id.* at 961-62.

28. *Id.* at 961.

29. *Id.* at 963. The court provided an extensive chart calculating each damage award and notably emphasized that the figure represented was "the actual compensatory award times nine (rounded out), *i.e.*, *the constitutional limit of punitive damages*." *Id.* at 964 n.8 (emphasis added).

30. *Id.*

federal courts in four cases upheld double- (*i.e.*, 10-99), triple- (*i.e.*, 100-999), or even quadruple- (*i.e.*, 1,000-9,999) digit ratios.[31] In a couple cases in which the jury awarded zero compensatory damages, the courts strained to meet the strictures of *State Farm*. One court decided that rather than view the ratio as infinite, it would use the backpay award as the compensatory reference mark despite Title VII's exclusion of backpay from compensatory damage.[32] With a revised single-digit ratio in hand, the court affirmed a 7:1 ratio.[33] Another court faced with a zero dollar compensatory award worried that the punitive award, despite being remitted from $250,000 to $175,000 in a Title VII harassment case, "dwarfed" the plaintiff's potential harm.[34] Accordingly, the court vacated the punitive award and remanded for a new trial on damages.[35] It is unclear how the new jury or the trial court conducting remittitur will comport with the federal appellate court's desires for less 'dwarfing.'

These courts strain to demonstrate compliance with *Gore*/*State Farm*'s guideposts. Yet, if one is cognizant of the policies behind punitive damages and the history and goals of civil rights damages, it becomes evident why some courts find it difficult to be faithful to a strict reading of the ratio component of the Supreme Court's guideposts.

How can we defend subordination of ratio to reprehensibility in the civil rights context but not in run-of-the-mill tort cases? What is the point of a ratio prong at all if reprehensibility simply provides an escape hatch? Where were we before having the constitutional guideposts?[36] Rather than ensuring due process, is it arbitrary that some awards will

31. *See*, *e.g.*, Romanski v. Detroit Entm't LLC, 428 F.3d 629, 646 (6th Cir. 2005) (ordering remittitur to a $600,000 punitive award where compensatory damage was $279 and thus permitting a ratio of 2,150:1); Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (rejecting proportionality entirely as antithetical to the vindication of constitutional rights and affirming a 150:1 ratio); Lincoln v. Case, 340 F.3d 283, 293 (5th Cir. 2003) (rejecting defendant's argument that anything above a 10:1 ratio violates due process and allowing a ratio of 110:1).

32. Tisdale v. Fed. Express Corp., 415 F.3d 516, 535 (6th Cir. 2005). Because a technical reading of the damages involved yields an infinite ratio of $100,000 in punitives to zero compensatories, this case is also included in the figure stated in text regarding courts that reduced the ratio of an award to a single digit. Strictly speaking, however, the infinite ratio still remains if the backpay award is never counted. The inclusion of this case in the category of cases that reduced to single-digit ratios is based on the court's desire and belief that its manipulation brought the ratio into *State Farm*'s single-digit directive.

33. *Id.*

34. Austin v. Norfolk Southern Corp., 158 F. App'x 374 (3d Cir. 2005).

35. *Id.*

36. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (providing that the three guideposts must be followed to provide an "[e]xacting appellate review [that] ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice'") (citations omitted).

survive despite a ratio problem while others will be shoehorned into a single-digit ratio pursuant to a strict application of the ratio prong? In sum, does the jurisprudence of *Gore/State Farm* provide flexible guideposts that allow courts to tailor the review to the peculiarities of civil rights (or any other torts) in order to reach just results or do courts' manipulations of precedent lay bare the indefensibility of the ratio test itself? Accordingly, the premise of this article is that civil rights cases are particularly well-suited to demonstrate the irrationality of the ratio prong.[37]

II. CIVIL RIGHTS CASE TREATMENT OF PUNITIVE DAMAGES

The landscape of cases relevant to this discussion diverges into two paths. One set of cases constitutes a circuit split on the issue of allowing punitive damages for civil rights violations despite the absence of compensatory awards.[38] The other set of cases in the civil rights arena post *Gore* hinge on the ratio prong. Critical to understanding this landscape are the Supreme Court precedential data points dictating that: (1) the value of a constitutional right is not itself compensable;[39]

37. This article specifically criticizes the ratio prong because the ratio test lends itself to rigidity (despite attempts to couch it as "not a rigid formula") thereby running counter to the goals of tort law. The focus on the unworkability of the ratio prong in the civil rights context is used to demonstrate the illogic of the ratio test in general. This focus should not be viewed as an approval of the disparity prong or of the Court's disallowance of extraterritorial evidence in establishing the reasonableness of the punitive award. There is much room for critique in these other areas as well. For a thoughtful treatment of the Court's misinterpretation of sovereignty principles and improper exclusion of extraterritorial conduct, see generally Professor Michael Allen, *supra* note 4.

38. *See generally* David C. Searle, *Keeping the "Civil" in Civil Litigation: The Need for a Punitive Damage – Actual Damage Link in Title VII Cases*, 51 DUKE L.J. 1683 (2002); Christy Lynn McQuality, *No Harm, No Foul?: An Argument for the Allowance of Punitive Damages Without Compensatory Damages under 42 U.S.C. § 1981a*, 59 WASH. & LEE L. REV. 643 (2002); Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L.J. 581 (2001); Kristine N. Lapinski, *Prerequisites or Irrelevant? Compensatory Damages in § 1981a Actions for Violations of Title VII of the Civil Rights Act of 1964, and Their Relationship to Punitive Damages*, 2001 L. REV. MICH. ST. U. DET. C.L. 1199 (2001); Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279 (2001); Justin W. Ristau, *Should Punitive Damages Be Recoverable Absent a Finding of Actual Damages under the Federal Fair Housing Act?* Louisiana ACORN Fair Housing v. LeBlanc, 211 F.3d 298 (5th Cir. 2000), 70 U. CIN. L. REV. 343 (2001).

39. *See* Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (holding that the purpose of damages under § 1983 was to compensate plaintiffs for their actual injuries and thus required remand to cure an erroneous jury instruction that allowed the jury to award compensatory damages based on the value of the constitutional rights violated). Perhaps this precedent is worthy of independent criticism given, for example, that "[r]ace discrimination cases, which might be regarded as particularly strong cases for the notion that violation of the right is harm in itself, have sometimes yielded awards so low that they seem almost discriminatory in themselves." DOBBS,

(2) presumed damages are not recoverable;[40] and (3) compensatory damages are awardable only upon proof of actual damage.[41] The jurisprudential picture intensifies in light of the fact that civil rights plaintiffs are often unable to prove actual damages despite an ability to prove the violation of civil rights laws.[42]

The common law tradition provides that a plaintiff cannot have a punitive damage award where there are no compensatory damages.[43] In the civil rights context, this creates a real conundrum because it is common for plaintiffs to prove little to no compensatory damage, yet a jury often will award punitive damages based on the proven violation of a civil rights law.[44] On the strict end of the spectrum, the Fourth Circuit prohibits awarding punitive damages without compensatory damages.[45] According to the Fourth Circuit, an award of nominal damages will not support a punitive award unless a statutory provision provides otherwise.[46] A few circuits have ruled that a backpay award permitted a punitive award despite the nonexistence of compensatory or nominal damages.[47] On the other end of the spectrum, certain circuits have held

supra note 14, § 7.4(3), at 344 (vol. 2).

40. *See* Carey v. Piphus, 435 U.S. 247, 263 (disallowing presumed damages in civil rights claims based on denial of procedural due process); *see also Stachura*, 477 U.S. at 310-12 (disallowing presumed damages for a substantive violation of First Amendment rights). *But see* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1266 (1979) (criticizing this line of cases and advocating for allowance of presumed damages to achieve the damage goals of constitutional torts).

41. *See* Farrar v. Hobby, 506 U.S. 103, 112 (1992) (declaring that the purpose of damages under § 1983 should be to compensate for injuries caused by constitutional violations and the jury should award compensatory damages only upon proof of actual injury).

42. *See* DOBBS, *supra* note 14, § 7.4(3), at 342 (vol. 2) ("Because damages for rights violations very often do not cause measurable economic harm, the claims are unquantifiable; and because they are unquantifiable, the size of the award – often very low – may reflect the very kind of bias that civil rights are designed to protect against.").

43. *See*, *e.g.*, 22 AM. JUR. 2D DAMAGES § 553 (May 2005); Gavcus v. Potts, 808 F.2d 596, 600 (7th Cir. 1986) (noting both litigants agreed that punitive damages could not lie in the absence of compensatories).

44. *See* Sala v. Nat'l R.R. Passenger Corp., 128 F.R.D. 210, 213 (E.D. Pa. 1989) (recognizing that "civil rights claims often produce only nominal damages or else declarations of rights, which do not translate easily into pecuniary terms") (citing H.R. Rep. No. 94-1558, at 9 (1976); *Carey*, 435 U.S. at 266); *see also infra* note 58 and accompanying text (discussing civil rights cases with nominal damage awards for compensatory harm).

45. *See* People Helpers Foundation, Inc. v. City of Richmond, 12 F.3d 1321, 1327 (4th Cir. 1993).

46. *Id.*

47. *See, e.g.*, Salitros v. Chrysler Corp., 306 F.3d 562 (8th Cir. 2002) (holding an award of backpay for an American with Disabilities Act case sufficient to sustain a punitive damage award despite no compensatory or nominal damages); Kerr-Selgas v. Am. Airlines, Inc., 69 F.3d 1205 (1st Cir. 1995) (permitting a punitive damage award in a § 1981a case in light of a backpay award despite the absence of compensatory or nominal damages, but noting that a punitive award cannot

that punitive damages are available for civil rights violations even absent compensatory damages or backpay awards.[48] Two more circuits permit an award of punitive damages in the absence of compensatory and nominal damages, but only if there is a proven violation of a constitutional right.[49]

The principle fault line in application of the ratio test to civil rights cases has been whether to adhere strictly to the Court's explicit preference for single-digit ratios or to nestle the case at issue in the Court's dicta regarding exceptions to its single-digit benchmark. The Court has attempted to soften the rigidity of its stated preference for single-digit formulations where "a particularly egregious act has resulted in only a small amount of economic damages."[50] In a wide variety of circumstances, courts have seized this window of opportunity in order to subordinate or ignore the ratio prong. For example, in the context of civil rights cases decided since *Gore*, courts have upheld the following ratios – 300,000:1,[51] 150:1,[52] 110:1,[53] 100:1,[54] 59:1,[55] 28:1,[56] and 20:1.[57]

stand in the absence of all three); *see also supra* note 32 and accompanying text (discussing the Sixth Circuit's utilization of a backpay award for ratio analysis).

48. *See*, *e.g.*, Cush-Crawford v. Adchem Corp., 271 F.3d 352 (2d Cir. 2001); Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008 (7th Cir. 1998).

49. *See*, *e.g.*, Louisiana ACORN Fair Housing v. LeBlanc, 211 F.3d 298 (5th Cir. 2000); Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000).

50. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (quoting BMW of North America v. Gore, 517 U.S. 559, 582 (1996)). Prior to the creation of the three guideposts, the Supreme Court discussed in dictum the issue of whether it is constitutionally allowable to permit a substantial punitive damage award in the face of a small actual damage award. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-60 (1993). Notably, the Court reasoned:

> For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury could reasonably find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.

Id. (quoting Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 668 (1991)). It is unclear where this reasoning stands in a post-*State Farm* world.

51. EEOC v. Harbert, 266 F.3d 498 (6th Cir. 2001) (upholding a $300,000 punitive damage award where jury awarded plaintiff $1 in nominal damages for a proven violation of Title VII based on sexual harassment).

52. Williams v. Kaufman County, 352 F.3d 994 (5th Cir. 2003) (upholding a $15,000 punitive award where plaintiff had obtained only a nominal award of $100 for a § 1983 claim based on an unlawful search and seizure).

53. Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) (permitting a 110:1 ratio as justifiable under the "egregious act" caveat after reducing the punitive award from $100,000 to $55,000 in order to comply with the FHA cap and expressing that the punitive award was reasonable and proportional to the $500 compensatory award).

54. United States v. Big D Enter., 184 F.3d 924 (8th Cir. 1999) (upholding 100:1 ratio in a racial discrimination case under the Fair Housing Act and § 1981).

55. Deters v. Equifax, 202 F.3d 1262 (10th Cir. 2000) (upholding a remitted punitive award

In one instance, a court stated that the ratio guideline was "inapplicable" to the determination of the reasonableness of the award at issue because the *Gore/State Farm* ratio keys to the difference between compensatory and punitive damages, while the case at bar concerned only nominal and punitive damages.[58] Another court emphasized that the "ratio guidepost offers little assistance" and concluded that "the use of a multiplier to assess punitive damages is not the best tool here."[59] The vast majority of

of $295,000 where plaintiff received a $5,000 compensatory damage award under Title VII for repeated incidents of sexual harassment committed by multiple co-workers and a supervisor). In *Deters*, the jury awarded $1 million in punitive damages that the district court remitted to $295,000 pursuant to the Title VII cap. *Id.* On appeal, the defendant Equifax argued that the ratio was excessively disproportionate. *Id.* at 1271. The court rejected defendant's position reasoning that *Gore*'s ratio test is "most applicable to purely economic injury cases where injury is not hard to detect." *Id.* at 1272-73. Then, the court emphasized the magic window from *Gore*: "[L]ow awards of compensatory damages may support a higher ratio if a particularly egregious act has resulted in a small amount of economic damages." *Id.* at 1273 (citing BMW of North America v. Gore, 517 U.S. 559, 582 (1996)). The court noted that cases involving primarily personal injuries may warrant greater ratios. *Id.*

56. Swinton v. Potomac, 270 F.3d 794 (9th Cir. 2001) (upholding a $1 million punitive award in a racial discrimination claim where the jury awarded plaintiff $5,600 in backpay and $30,000 for emotional distress).

57. Hardeman v. City of Albuquerque, 377 F.3d 1106 (10th Cir. 2004) (upholding a remitted punitive award of $625,000 in a § 1981 and § 1983 claim where plaintiff recovered $31,225 in compensatory damages). The *Hardeman* court upheld the 20:1 ratio noting that the *Gore* guideposts are "instructive" but "not technically controlling." *Id.* at 1123 (relying on the comparable case of EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999), for the proposition that ratio "alone does not require reduction"). *See also* Hampton v. Dillard Dep't Store, 247 F.3d 1091 (10th Cir. 2001) (upholding a 20:1 ratio with a $1.1 million punitive award where jury granted a $56,000 compensatory award to African-American women who had been wrongfully accused of shoplifting on the basis of race). The *Hampton* court justified the high punitive award on the grounds that the injury was hard to detect and the value of noneconomic harm hard to determine. *Id.* Then, the court followed *Deters* in holding that a primarily personal injury supports a ratio in excess of 10:1. *Id.* (citing *Deters*, 202 F.3d 1262).

58. *Williams*, 352 F.3d at 1016 n.76 (noting *State Farm*'s presumptive invalidation of extreme ratios, but finding the ratio prong inapplicable because of the nonexistence of compensatory damages in the case). In a § 1983 case where the jury awarded only nominal damages, but $200,000 in punitive damages, the Second Circuit requested that plaintiff remit to a punitive award of $75,000 or undergo a new trial. *See* Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996). The court contrasted *Gore*'s "breathtaking" 500 to 1 ratio to a civil rights case where compensatory damages are nominal and declared that "a much higher ratio can be contemplated while maintaining normal respiration." *Id.* at 811. The court reasoned that "[s]ince the use of a multiplier to assess punitive damages is not the best tool here, we must look to the punitive damages awards in other civil rights cases to find limits and proportions." *Id.* Ultimately, the court found that "in police misconduct cases sustaining awards of a similar magnitude, the wrongs at issue were far more egregious" and accordingly ordered remittitur or a new trial. *Id.* at 812.

59. DiSorbo v. Hoy, 343 F.3d 172 (2d Cir. 2003) (reviewing on appeal an excessive force claim with a $625,000 punitive award and a $400,000 compensatory award – 1.5:1 ratio – and a nominal award for abuse of process with a $650,000 punitive award, rejecting the ratio guidepost for the abuse of process claim, and ultimately ruling that despite sufficiently reprehensible conduct, the combined $1.275 million punitive award was excessive in comparison to similar police

cases upholding ratios in excess of single digits, however, rely on the *Gore/State Farm* dicta regarding particularly egregious conduct yet small economic damages.

For example, the Ninth Circuit upheld a 28:1 ratio in a § 1981 claim brought by an African-American employee who suffered a constant barrage of racially offensive harassment.[60] As to the ratio guidepost, the court acknowledged that they were uncertain how to conduct this analysis because the punitive and compensatory damages yielded a 28:1 ratio.[61] The court maneuvered around any perceived problem by relying on the familiar refrain that a higher ratio may be appropriate if a "particularly egregious act has resulted in only a small amount of economic damages."[62] Furthermore, the court relied on *Gore* for the proposition that a higher ratio is permissible where the injury is hard to detect or the monetary value of noneconomic harm difficult to determine.[63] The court reasoned that the case at bar was precisely the type posited in dicta by the Supreme Court in *Gore*. According to the Ninth Circuit, the economic damages were lower because the aggrieved employee was paid a low wage ($8.50 per hour), while the personal indignity was difficult to calculate.[64] In cases such as these, where the injury is primarily personal, a greater ratio may be appropriate.[65] The court considered the wealth of the defendant,[66] but found that the award was not excessive.[67] The court noted that it did not want to rely heavily on other similar cases because the circumstances vary so widely. Accordingly, to the court, "[s]uch an exercise simply results in a scatter graph that pushes the decision toward a mathematical bright-line, a path

misconduct cases and warranted only an award of $75,000 in punitives – resulting in a 1:3 ratio).

60. *Swinton*, 270 F.3d at 818. The court compared the $1 million punitive damage award to $35,600, which represented the combined backpay and emotional distress awards, $5,600 and $30,000, respectively. *Id.*

61. *Id.*

62. *Id.* (citing BMW of North America v. Gore, 517 U.S. 559, 582 (1996)).

63. *Id.*

64. *Id.*

65. *Swinton*, 270 F.3d at 818 (citing *Deters*, 202 F.3d at 1273).

66. In a post-*State Farm* environment, it may be that defendant's wealth may slip from its traditional relevance in assessing punitive damages against defendants. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 438 n.2 (2003) (noting that the Supreme Court in *TXO* acknowledged that "under well settled law," a defendant's "impressive net worth" was a factor "typically considered in assessing punitive damages[,]" and warning that "[i]t remains to be seen whether, or the extent to which, today's decision will unsettle that law.") (Ginsburg, J., dissenting). The majority in *State Farm* stated that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427 (majority opinion) (citing *Gore*, 517 U.S. at 585).

67. *Swinton*, 270 F.3d at 819.

that we eschew in accord with the Supreme Court guidelines."[68] Ultimately, the court found that the punitive award, despite the 28:1 ratio, comported with due process.[69]

In 2005, the Ninth Circuit confronted another punitive award in a civil rights case, but this panel dogmatically applied the ratio test to rein in a punitive award in a § 1981 claim and a state breach of contract action.[70] Plaintiff Bains LLC, a corporation owned by three East Indian Sikh brothers, entered into a contract with defendant ARCO to haul fuel.[71] ARCO subjected the three brothers to extreme discriminatory treatment by referring to them with derogatory epithets and subjecting them to unequal treatment in comparison with other non-Indian drivers.[72] Despite complaints, no disciplinary action resulted and, instead, ARCO terminated its contractual relationship with Bains.[73] Based on the unlawful discrimination, the jury awarded $1 in nominal damages and $5 million in punitive damages.[74] For the state breach of contract claim, the jury awarded $50,000.[75] The district court denied ARCO's post-trial motions, and ARCO challenged the $5 million punitive award on appeal.[76] The Ninth Circuit found sufficient reprehensibility to warrant a punitive award.[77] Regarding the ratio guidepost, the court relied on *State Farm*'s preference for single-digit ratios.[78] For the purposes of the ratio analysis, the court utilized the $50,000 compensatory award for the breach of contract claim for comparison with the $5 million punitive award – a 100:1 ratio.[79] The court also quoted the window of "particularly egregious act" with "small economic damage," but reasoned that economic damages in the case at bar, $50,000, were not "a small amount" and thus, that this case was not the "rare case" alluded to in *State Farm*.[80] The court concluded that the "controlling Supreme Court authority therefore implies a punitive damage *ceiling* in this case of, *at most*, $450,000 (nine times the

68. *Id.*
69. *Id.* at 820.
70. *See* Bains LLC v. ARCO Prod. Co., 405 F.3d 764 (9th Cir. 2005)
71. *Id.* at 767.
72. *Id.* at 767-68.
73. *Id.* at 768.
74. *Id.* at 769.
75. *Id.*
76. *Id.*
77. *Id.* at 775.
78. *Id.* at 776.
79. *Id.* Excluding the contract claim, the ratio for the civil rights claim would be 5,000,000:1.
80. *Id.* at 777.

compensatory damages)" rather than the $5 million punitive award.[81] Bolstering its rationale, the court examined the third guidepost – disparity between the punitive award and comparable sanctions – by analogizing to the $300,000 statutory cap from Title VII as "an appropriate benchmark for reviewing § 1981 awards, even though the statute did not apply to § 1981 cases."[82] The court emphasized that there are constitutional limits to punitive damages irrespective of defendant's wealth.[83] Combining the ratio and disparity guideposts, the court remanded the case seeking a reduction of the $5 million jury award to a figure between $300,000 and $450,000 ratio ceiling.[84]

The Eighth Circuit sliced a punitive award in a § 1981 racial harassment case down to a 1:1 ratio in order to comport with due process concerns.[85] It considered the Title VII cap, noting the instant punitive award of $6 million was 20 times the cap. While the court acknowledged that the Title VII cap does not extend to § 1981 cases, the "discrepancy when coupled with the other infirmities that we discern in this award is telling and hard to ignore."[86] The court also examined the ratio by comparing the $6 million punitive award to the remitted $600,000 compensatory award – a ratio of 10:1. The court emphasized that while due process cannot be left to simple numerical ratios:

> [O]ne should not overstate the extent of the Court's aversion to ratios. The Supreme Court has observed that a ratio that exceeds single digits pushes the outer limits of constitutionality. It is not that such a ratio violates the Constitution. Rather, the mathematics alerts the courts to the need for special justification. In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand.[87]

The court found that the defendant's conduct was not so "egregiously reprehensible" to justify a punitive award over ten times the compensatory award.[88] Relying on *State Farm*'s dictum that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due

81. *Id.* at 776 (emphasis added).
82. *Id.* at 777.
83. *Id.*
84. *Id.*
85. *See* Williams v. ConAgra Poultry Co., 378 F.3d 790, 796 (8th Cir. 2004).
86. *Id.* at 798.
87. *Id.* at 799.
88. *Id.*

process guarantee[,]" the court dramatically reduced the punitive award to equal the compensatory award of $600,000 creating a 1:1 ratio.[89]

III. POLICY BEHIND PUNITIVE DAMAGES

Punitive damages first arose in cases of dignitary torts. Under early common law rules, emotional distress was not compensable, but juries awarded large sums and courts upheld the verdicts. Courts developed the theory of punitive damages to explain what they were doing; such damages were needed to deter and punish wrongdoing that might otherwise go unpunished and undeterred because it did no compensable harm. Courts also feared that plaintiffs would take matters into their own hands if the law provided no effective remedy.[90]

Within the context of civil constitutional harms, the ratio test fails to service the goals of punitive damages. The commonly listed goals of punitive damages include punishment, deterrence, and litigation finance.[91] Although contrary to doctrinal dictates,[92] punitives in practice may fill gaps left by compensatory awards that fail to make plaintiff whole.[93]

Reflexively, courts echo the twin pillars of punitive damage

89. *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

90. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES – CASES AND MATERIALS 727 (3d ed. 2002) (citing Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982)). *See also* Douglas Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention*, 9 REV. LIT. 473, 499 (1990) ("Indeed, punitive damages originated as a remedy for dignitary torts at a time when the common law refused to compensate mental distress.") (citing Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982)).

91. *See*, *e.g.*, Dan Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 844-47 (1988) (outlining the distinct goals of desert, deterrence (specific deterrence), example (general deterrence), litigation finance, and compensation for intangible injury). *See generally* LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (3d ed., Michie 1995).

92. City of Newport v. Fact Concerts, Inc., 453 U.S. 257, 266 (1981) ("Punitive damages by definition are not intended to compensate the injured party . . . .").

93. Particularly in the civil rights context, compensatory damages leave "cavities" that punitives fill. *See* David Partlett & Russell Weaver, *Filling Cavities*, 39 BRANDEIS L.J. 677, 677 (2001) (explaining that "[t]he traditional division of courses in law schools leaves cavities in the legal knowledge of the graduate"). The best cure for civil rights cases might lie in reconceptualizing the commodification of the actual harm. The dignitary nature of the harm at issue sparks difficulties in assigning dollar figures to the harm caused. This challenge, coupled with the Supreme Court's foreclosure of presumed damages in this arena, may well leave punitive damages as the "best second best cure for the cavity problem." *Id.* (reasoning that "a good Remedies course is the best second best cure for the cavity problem" caused by the traditional course design of law schools).

awards: punishment and deterrence.[94] The pillars for punitive damages stem from the justifications for criminal punishment.[95] The two primary competing theories motivating criminal laws are utilitarianism and retributivism.

Pursuant to classical utilitarian theory, each law should maximize society's net happiness.[96] The only acceptable justification for imposing criminal punishment occurs when the expected result is a reduction in the pain of crime that otherwise would occur.[97] The necessary underpinning for this justification is that people will behave in a manner that seeks to avoid pain and increase pleasure (*i.e.*, hedonistic behavior).[98] According to a utilitarian model, an individual contemplating criminal activity will avoid committing a crime "if the perceived potential pain (punishment) outweighs the expected potential pleasure (criminal rewards)."[99]

With this premise in mind, utilitarians most often emphasize "general deterrence" – by punishing an individual wrongdoer, the general community will refrain from criminal activity in the future.[100] Utilitarians view punishment as a means to the desired end of a net reduction in crime because they believe a defendant's "punishment *teaches us* what conduct is permissible; it *instills fear* of punishment in would-be violators of the law; and, at least to a limited extent, it *habituates us* to act lawfully, even in the absence of fear of punishment."[101] An alternative goal of utilitarian philosophy is "specific deterrence" – punishing an offender will prevent that person from

94. *See* RESTATEMENT (SECOND) OF TORTS, § 908(1) (1979); *see also State Farm*, 538 U.S. at 419 (2003); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) ("It would be simplistic to characterize [this position] as mere blind adherence to an outmoded principle. Rather, the doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.") (quoting Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 641 (1980)).

95. *Cf. State Farm*, 538 U.S. at 417 (stating that punitive "awards serve the same purposes as criminal penalties"). *See also* David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 782, 785 (1996) (noting that "the deep common law roots" of punitive damages "have not always been recognized, because of the modern law's drive to divorce tort from criminal law [but that] the criminal law roots of tort have remained fast in the award of punitive damages").

96. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. Bowring ed., 1843); JOHN STUART MILL, UTILITARIANISM (1863).

97. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 9 (2d ed. 1997).

98. *Id.*

99. *Id.*

100. *Id.* at 10.

101. *Id.* (emphasis added).

committing future misconduct.[102] The catalysts for specific deterrence lie in the defendant's *incapacitation* through imprisonment, which rules out criminal conduct outside the prison walls, and in *intimidation* of a defendant because the punishment will serve as a reminder that committing more crime will result in more pain.[103]

According to a nonclassical strain of utilitarianism, the goal of crime reduction should be attained through *rehabilitation*.[104] Proponents prefer the utilization of a reform model rather than the pejorative punishment framework. They believe that future compliance to the law will stem from rehabilitating the defendant through reform techniques such as education, therapy, or even lobotomies.[105]

Retributivism in its most simple enunciation validates "just deserts" – the fact that one deserves to be punished justifies and warrants punishment.[106] A critical premise to the retributivist is that the defendant voluntarily chose to violate the rules of society and thus society may justly blame and punish the wrongdoer.[107] Some retributivists believe that it is morally correct to hate criminals and to seek public revenge through the criminal justice system while deterring private vengeance.[108]

Another retributive theory, labeled *protective retribution*, maintains that punishment will resecure society's moral balance.[109] If everyone follows the rules, balance exists.[110] If an individual *chooses* to commit a crime and burden society, the individual's failure to exercise self-

102. JOSHUA DRESSLER, *supra* note 97, at 10; *see also* Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 353 (2d Cir. 2002) (contrasting the distinct function of retribution and noting "[g]eneral and specific deterrence are also traditional justifications for punishment . . ."). Tort law on punitive damages incorporates both specific and general functions of deterrence. *See* Dobbs, *supra* note 91, at 844-45. Some commentators caution, however, that "if the tort system . . . attempts to pick up the slack [created by other regulatory controls such as administrative and criminal law] via punitive damages, overdeterrence may well result." Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in the Law)*, 107 YALE L.J. 2071, 2084 (1998).

103. DRESSLER, *supra* note 97, at 10. The relevant paradigm for punitives in the civil rights context is the intimidation catalyst.

104. *Id.*

105. *Id.*

106. *Id.* at 11. *See generally* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd translation 1965); IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887). In the tort punitive context, see generally Dobbs, *supra* note 91. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (stating that punitive damages "are private fines levied by civil juries to punish reprehensible conduct . . .").

107. DRESSLER, *supra* note 97, at 11.

108. *Id.* at 12.

109. *Id.* (noting that Professor Margaret Jane Radin coined the term "protective retribution").

110. *Id.* at 12-13.

restraint destroys the equilibrium.[111] The wrongdoer, a morally responsible agent, must repay the debt owed to society in order to return balance to society.[112] Yet another strain of retributivism focuses on vindicating the victim by utilizing punishment proportional to the crime in order to "right a wrong."[113]

Although most rely on utilitarian or retributivist theory to justify punishment, *denunciation* provides an alternative or hybrid ground for punishment.[114] Denunciation justifies punishment as "a means of expressing society's condemnation of a crime."[115] As such, denunciation may serve various functions, including: *educating* individuals that the community disapproves of certain behavior, *channeling* the anger of the community away from vengeance, *maintaining* social cohesion, and *stigmatizing* the wrongdoer.[116]

These principles of criminal law provide the backdrop for the goals most commonly enumerated for punitive damages. Whether one concludes that the utilitarians, the retributivists, or some variation of the two reign the day, the Supreme Court's ratio test in the context of constitutional rights fails to promote most, if not all of, these philosophical underpinnings of punitive damages. If anything, the ratio test in any machination frustrates the purpose of punitive awards. Although inferior federal courts are not free to jettison the ratio test, some courts have subordinated the ratio test to the reprehensibility prong in an effort to serve underlying policy goals.

IV. POLICY BEHIND CIVIL RIGHTS DAMAGES

Tort policy and the legislative history of § 1983 demonstrate that constitutional tort damages should aim to compensate the plaintiff, deter violative conduct, and vindicate the aggrieved.[117] Courts fashion § 1983 damages for constitutional rights violations according to common law principles of tort.[118] Holding punitive damages to the side, tort damages seek to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty."[119] The compensatory component "may

111. *Id.* at 13.

112. DRESSLER, *supra* note 97, at 13.

113. *Id.* (citing Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992)).

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* Love, *supra* note 40, at 1266.

118. Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986).

119. *Id.* (citation omitted).

include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . ., personal humiliation, and mental anguish and suffering.'"[120] According to the Supreme Court, § 1983's "basic purpose . . . is to *compensate persons for injuries* that are caused by the deprivation of constitutional rights."[121] Punitive damages are recoverable for the vindication of constitutional torts,[122] and may be available where defendant's conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[123] The Supreme Court has emphasized: "[W]e discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action."[124] Adopting the common law standard of reckless disregard of the rights of others rather than requiring actual intent to injure, the Supreme Court pointed out the alliance with the purposes of punitive damages: "[T]o punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future."[125]

The Civil Rights Act of 1991 authorizes punitive damages in claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 where the defendant engages in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[126] Title VII provides a scale capping punitive damage based on the size of the defendant employer with a maximum punitive award of $300,000 for an employer with more than 500 employees.[127]

Congress did not adopt a statutory cap for § 1981 claims, and courts have permitted the recovery of punitive damages for such causes of action.[128] The § 1981 cases follow the rationale of § 1983 cases for the allowance of punitive damages with its common law justifications.

Regardless of well-formulated policies of civil rights laws, it is not uncommon to hear that the recovery of any damages at all is a faint

120. *Id.* at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

121. *Id.* (quoting Carey v. Piphus, 435 U.S. 247, 254 (1978)).

122. *See*, *e.g.*, Smith v. Wade, 461 U.S. 30 (1983) (affirming a punitive damage award in a § 1983 action).

123. *Id.* at 46 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1977)).

124. *Id.* at 48-49.

125. *Id.* at 55 (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1977)).

126. 42 U.S.C. § 1981a(b)(1) (2006); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 539 (1999) (limiting vicarious liability under this provision).

127. 42 U.S.C. § 1981a(b)(3) (2006).

128. *See*, *e.g.*, Swinton v. Potomac, 270 F.3d 794 (9th Cir. 2001); Hampton v. Dillard, 247 F.3d 1091 (10th Cir. 2001).

aspiration for many plaintiffs who claim violations of constitutional rights.[129] For a variety of reasons, many aggrieved individuals never discover the identity of the wrongdoer or will never sue to vindicate the right. Then, for those who do pursue litigation, they face an uphill battle. If damages remain elusive to so many despite the violation of a civil right, are we leaving those individuals without a remedy? Doesn't this chip away at the right itself and damage the underlying substantive law?

Despite the aspirational intent of civil rights laws and constitutional protections, numerous obstacles lie in the path of civil rights plaintiffs. Many obstacles preexisted the Supreme Court's constitutionalization of punitive damage awards. Such hurdles may thwart efforts to compensate plaintiffs and deter defendants' wrongful behavior. Official immunity poses a serious roadblock to vindicating plaintiffs' rights in certain circumstances.[130] The immunity doctrine potentially arises where constitutional violations involve state actors and in other civil rights cases involving public employees as defendants. Immunity has no regard for the occurrence of an actual civil rights violation; it is a defense that is grounded in other considerations having nothing to do with civil rights, but rather sovereignty. As such, an immunity defense is going to have the effect of systemic undercompensation for plaintiffs harmed by government action. This immunity barrier, which others have analyzed in more detail,[131] shows that civil rights plaintiffs as a

129. Rendleman, *Irreparability Resurrected*, *supra* note 17, at 1362 (noting that damages for violation of a plaintiff's constitutional rights are "more often an aspiration rather than a policy") (quoting Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 665, 668 (1975)).

130. *See*, *e.g.*, *id.* at 1355 (noting that plaintiffs claiming an Establishment Clause violation face three barriers: "official immunity, the nature of the plaintiff's injury, and the jury process").

131. *See id.* ("In constitutional damages litigation, when an official defendant has invaded a plaintiff's constitutional right, the plaintiff often cannot recover damages because the official enjoys immunity."). Because the immunity barrier "cuts off a plaintiff's ability to recover her proved damages for the defendant's proved violation[,]" Professor Rendleman suggests injunctive relief as a viable alternative for plaintiffs attempting to vindicate constitutional rights against immune defendants. *Id.* at 1356. Immunity does not bar injunctive relief in such settings. *Id.* According to Professor Michael Wells, if we assume a valid ground for the immunity defense is avoiding overdeterrence, "the Court should not view immunity in isolation, but should strive to accommodate the 'avoiding overdeterrence' goal with the goals of vindicating constitutional rights and deterring constitutional violations." Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 223 (1998). Where immunity is not a barrier, Professor Wells recognizes the problem of the common law model that separates damages into only compensatory versus punitive damages and suggests that the Court should create

> federal common law to invent a new category of 'extra-compensatory' but avowedly non-punitive damages, and instruct the jury that such damages may be awarded if the jury decides that society's interest in deterring a given constitutional violation requires a

class are already vulnerable to undercompensation before we even get to punitive recovery and its proportionality to compensatory damages.

V. MISMATCH & MISCOMMODIFICATION

What can we learn when we zipper together the civil rights case treatment of the ratio prong with the remedial policies behind punitive damages? What we know:

- The Supreme Court has engaged in judicial tort reform in order to provide defendants with due process protection from runaway jury verdicts. Cases triggering the court's heavy-handed response stem from state jury verdicts and principally embody traditional torts such as bad faith, personal injury, product liability, and fraud.

- The Supreme Court created the *Gore* three-prong guideposts for courts (state and federal) to determine the constitutional reasonableness of a punitive award. *State Farm* enshrined the ratio prong of the guideposts and emphasized a strong preference for single-digit ratios. Although the Court stated that rare exceptions may call for higher ratios, it did not exempt any classes of cases or provide clear guidance for the creation of exceptions.

- Even though there may be certain cases that are the intended exceptions, judges key jury instructions to include cautionary language about the import of the ratio.[132]

- Some courts are skirting the ratio prong and the Supreme Court's stated preference for single digits in favor of a focus on reprehensibility, while others feel duty-bound to reduce the punitive award to comply with *State Farm*'s guidance.

- Civil rights cases often result in little to no compensatory

bigger payment from the defendant than the compensatory award the plaintiff would ordinarily receive.

Id. at 222.

132. *See*, *e.g.*, Jury Instructions from Bains LLC v. ARCO Prod. Co., 405 F.3d 764 (9th Cir. 2005), Instruction No. 21, *Punitive Damages* ("In considering punitive damages you may consider . . . the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.") (on file with author).

damages, even though such cases are characterized by important societal interests at stake and high levels of reprehensibility.[133]

- The Supreme Court has ruled that civil rights violations do not warrant presumptive damages and compensatory damages may not be based upon violation of the right at stake.

- A collection of federal circuit courts also strike punitive awards in their entirety in the civil rights arena based on transference of the common law maxim – no compensatories, and therefore, no punitives.

- Civil rights laws have been crafted in a way to foster a private attorney general function that supplements governmental enforcement.

- Punitive damages serve, at a minimum, the functions of punishment and deterrence. These are independent, albeit related, functions.

Given the potential factual scenarios involved in civil rights cases and the policies at stake, logic would dictate that this arena is ideal for punitive awards, especially given that presumed damages are not allowed.

How do these points match up with the leading theories and goals of punishment? The deterrence model is the intellectual brainchild of the utilitarian movement grounded in rational actor theory. A strict adherence to ratios in the civil rights context should be of concern to utilitarians for two reasons: (1) it will underdeter both specifically and generally because small multiples of a small number of compensatories will systematically underdeter both the specific defendant and other potential future offenders; and (2) by taking away the meaningful chance for a significant award, the rational actor on the other side of the "v" will

133. After describing the important public benefits served by civil rights plaintiffs seeking to vindicate vital civil and constitutional rights that "cannot be valued in solely monetary terms[,]" the Supreme Court in *Rivera* rejected a defense argument that attorney fee awards authorized by civil rights statutes should be proportionate to the amount of damages that the plaintiff recovers. City of Riverside v. Rivera, 477 U.S. 561, 574-80 (1986). In particular, the Court emphasized that "[a] rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts[,]" and that such a proportionality rule would be "totally inconsistent with Congress' purpose in enacting § 1988." *Id.* at 578.

be significantly less likely to bring suits to vindicate important constitutional rights.

A retributivist perspective might well center on an assessment of the moral value of the violation committed. This issue carries quantification problems that parallel the difficulty of commodifying dignitary harms. If a retributivist, however, would place a high value on the importance of respecting civil and constitutional rights, then the current remedial scheme is likely to fail to punish adequately lawbreakers in this arena. Of course, criminal law also has core concerns regarding the proportionality of punishment. Although the ratio guidepost sounds like proportionality, criminal law focuses on reprehensibility and further allows strong punishment of crimes of attempt where there is no actual harm. This may relate to the ratio test's original phrasing as a comparison of punitives to "actual or potential harm," but many courts in the civil rights arena have been fixated on the actual harm proven in the form of compensatories rather than the philosophically potential harms to the individual or to society generally.

In addition to the ratio focus's disharmony with the philosophical underpinnings of punishment, the varied court treatment of punitive damages and the ratio guidepost also demonstrates the need for reform of the judicial tort reform already in place. The ratio test is inconsistent with the reprehensibility prong. Civil rights cases paint a particularly helpful picture of the unworkability and irrationality of the ratio prong.[134] The lessons learned in this arena should extend beyond civil rights cases. *Mathias* and *Willow Inn* signal that courts in realms outside civil rights subordinate ratio to reprehensibility,[135] while other courts strictly adhere to the strong preference for single-digit ratios.[136] Does all of this evidence confirm the wisdom of the Supreme Court in fashioning a flexible guidepost that provides courts the wiggle room they need to treat different cases differently? Or, are the fact scenarios in civil rights cases laying bare the flawed nature of the precedential line?

Perhaps the Court hoped to sharpen the ratio guidepost in order to show that it could constrain its children (including state supreme

134. Justice Scalia refuses to give *Gore stare decisis* effect and calls into question the whole body of "punitive damages jurisprudence which has sprung forth from *BMW v. Gore* [because it] is insusceptible of principled application." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting); *cf. id.* (Thomas, J., dissenting on the basis of inapplicability of the Constitution to the size of punitive awards).

135. *See supra* note 13 and accompanying text (providing traditional tort cases in which the courts subordinated the ratio prong to the reprehensibility prong).

136. *See supra* notes 22-29 and accompanying text (exploring courts that reduced punitive awards in order to comport with a single-digit ratio).

courts)[137] and institutionally defend itself against attacks of out-of-control jury awards. Certain defense interests continue to clamor for even more protection from the courts and legislatures. They seek a rigid numerical benchmark (of course, they would prefer the abolishment of punitive damages), and sometimes they are victorious in receiving it. To combat arbitrariness, they have suggested mimicking the sentencing guideline structure. Would that clarify the situation?

Of course, defendants generally desire certainty and predictability, but punitive damages historically lend unpredictability in order to avoid the *Pinto* temptation of subordinating the moral imperative to economic justification.[138] Constitutional due process does not require certainty and predictability in punitive awards. Rather, according to the Supreme Court, due process commands that awards not be grossly excessive or arbitrary.[139] In reaction to unsatisfactory state common law standards governing punitive awards, the Court established the three guideposts.[140] Pursuant to the ratio prong, the reasonableness of awards should in part hinge upon a comparison of compensatory damages to punitive damages.[141] Yet, this comparison assumes that there is logic to the application of a searching for a ratio with an eye towards closing the gap between punitive and compensatory awards until, in the Court's ideal framing, one hits the single-digit nirvana. Keying off the compensatory award as the foundation further assumes that the legal system correctly captures the commodification of harm in its compensatory award. The assumptions are fundamentally flawed in certain respects. For example, consider the following posed by Professor Doug Laycock:

> Which way does the amount of compensatory damages cut? Courts often say that punitive damages must be in a reasonable ratio to compensatory damages. The suggestion is that the smaller the

137. Perhaps stepchildren who have passed the age of majority would be closer to the mark. The Supreme Court may be acting as an institutional parent over state supreme courts via substantive due process. Justice Scalia, Justice Thomas, and states' rights advocates assert that the state supreme courts should maintain their right to have the final say over the punitive damages stemming from state laws. *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *Id.* (Thomas, J., dissenting).

138. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 777, 813 (1981) (regarding Ford's failure to correct defects in its Pinto car design, the court found "evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.").

139. *See State Farm*, 517 U.S. at 416-17 (describing the procedural and substantive federal constitutional limitations).

140. BMW of North America v. Gore, 517 U.S. 559, 575 (1996).

141. *Id.*

> compensatories, the smaller the punitives. Isn't that backwards? If part of the rationale for punitives is to deter wrongful conduct that does little measurable harm, and to express and channel outrage at such conduct, aren't small compensatories an argument for larger punitives?[142]

The inference of the questions posed by Professor Laycock raises an interesting point given his recitation of the origin of punitives.[143] According to Professor Laycock, "[p]unitive damages are necessary primarily when compensatory damages are small."[144] He also posits the illogic of the ratio principle where compensatory damages are large enough to punish or deter obviating the need for punitives.[145] In particular, he explains that, in the *Pennzoil* litigation, the court's award of $7.5 billion in compensatory damages and a remitted $2 billion in punitive damages demonstrates one critical point regarding punitives: "[T]he traditional notion that punitive damages should be proportionate to compensatory damages is absurd."[146]

Ratios generally say nothing about the appropriateness of punitives. Ratios send a *nice* message that the Court will step in to reform the judicial system in favor of defendants and give everyone a sense of mathematical precision in an arena rife with gray areas. The Court intends the ratio guidepost to curtail arbitrary awards. What the ratio actually does is create an illusion of precision in an unstable world.[147] Imprecision, however, may be itself an asset in the punitive context.[148]

142. LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 90, at 737.

143. *See supra* note 90 and accompanying text.

144. Laycock, *The Remedies Issues*, *supra* note 90, at 499. He cautions, however, that it would be "an oversimplification to state that punitive damages should be inversely proportional to compensatory damages, but that would come closer to good sense than the existing rule." *Id.*

145. *Id.*

146. *Id.*

147. "In truth, the [*Gore* majority's three] 'guideposts' mark a road to nowhere; they provide no real guidance at all." BMW of North America v. Gore, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting). The advocates of *Gore*'s guideposts were unable to convince Justice Scalia to join the majority's reasoning seven years later despite the rule of *stare decisis*. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) ("I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly I do not feel justified in giving the case *stare decisis* effect.").

148. In Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985), the court reasoned:

> [T]he lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine. 'Punitive damages . . . can be individualized to provide a deterrent that will be adequate for each case.' Such flexibility can ensure a sufficient award in the case of a rich defendant and avoid an overburdensome one where the defendant is not as wealthy. Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability. In short, '*[a]lthough a quantitative formula would be comforting, it would be undesirable*.'

When applied rigidly, it leaves the aggrieved and the right undervindicated while the defendant remains underdeterred and underpunished. When some courts subordinate the ratio test and others do not, are we any closer to eradicating the very arbitrariness the Court claims due process protects against?

Perhaps a singular focus on punitive damages in the civil rights context misses a deeper discomfort with the valuation of dignitary harms.[149] Dignitary harms present serious problems of valuation.[150] The commodification of such harms – and the jury's role as the commodifier – has generated great controversy and is a continued source of consternation for legal commentators, litigants, and jurists.

The focus on punitive damages in the civil rights arena is a function of the Supreme Court's determination that presumed damages are not available for civil rights plaintiffs.[151] According to Professor Dan Dobbs, presumed damages potentially serve three purposes depending upon which court or commentator is using the term: (1) to compensate for harm that is presumed to exist, but difficult or impossible to prove; (2) to assign value to the right violated without consideration of the plaintiff's actual harm beyond the right; and (3) to encourage suits to vindicate those rights "especially when any citizen's loss of the right may tend to diminish the rights of others as well."[152] The Supreme Court has dispensed with any vehicle to serve the first two rationales. The first rationale shares a common policy genesis with punitive damages.[153] The Supreme Court expressly prohibited the second

Id. at 1359 (quoting Mallor & Roberts, *Punitive Damages*, 31 HASTINGS L.J. 639, 648-49, 657, 666 (1979) (emphasis added)).

149. Dignitary harms "involve some confrontation with the plaintiff in person or some indirect affront to his personality." DOBBS, *supra* note 14, at § 7.1(1), at 259 (vol. 2). While at common law such dignitary harms included a host of torts like assault, false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation, and others, "these torts have their statutory and constitutional analogues . . . including federal or state civil rights statutes." *Id.*

150. Mathias v. Accor Econ. Lodging, 347 F.3d 672, 676-77 (7th Cir. 2003) (justifying the need for the availability of punitive damages, in part, because compensatory damages "are difficult to determine in the case of acts that inflict largely dignitary harms"); *see also* Mathie v. Fries, 121 F.3d 808, 814 (2d Cir. 1997) (noting that, where prison director sodomized and raped plaintiff, the lower court "faced a difficult task in attempting to value the trauma suffered . . ., both because the extent of emotional injury does not readily translate into dollar amounts and because few truly comparable cases can be found").

151. *See* Carey v. Piphus, 435 U.S. 247 (1978) (disallowing presumed damages in civil rights claims based on denial of procedural due process); *see also* Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) (disallowing presumed damages for a substantive violation of First Amendment rights).

152. DOBBS, *supra* note 14, § 7.1(2), at 261 (vol. 2).

153. *See* LAYCOCK, *supra* note 90.

rationale.[154] The third rationale echoes the criminal law principles of deterrence and retributivism. Without the vehicle of presumed damages, punitive damages theoretically remain available. Punitive damage application, however, in generic tort cases and its subsequent ensnarement in tort reform battles and culture wars has led to a body of case law that threatens the only remaining vehicle to serve these two important purposes in civil rights cases, which presumed damages were also designed to protect. The resulting body of precedent is disjunctive with the entire purpose of civil rights laws.

The Court prohibits allowing presumed damages for the dignitary harm that occurs in civil rights cases, and it further bars the inclusion of the harm to the right itself as a part of compensatory damages. Several circuits prohibit civil rights plaintiffs from recovering for emotional distress harm without introducing corroborative expert testimony.[155] For civil rights plaintiffs who possess little to zero provable actual harm, the ratio ties to a compensatory *award* that will not in fact compensate for the harm suffered. What is the harm suffered? Is it possible that our system which generally *does the best it can* does not have a mechanism to commodify adequately the dignitary type of harm endured? There is the dignitary harm to the individual plaintiff, harm to "absent plaintiffs" or "quasi-plaintiffs,"[156] harm to society,[157] harm to tort laws and

154. *See Stachura*, 477 U.S. at 310.

155. "[D]eprivation of constitutional rights may be awarded only when claimants submit proof of actual injury." Patterson v. PHP Healthcare Corp., 90 F.3d 927, 938 (5th Cir. 1996) (citing *Carey*, 435 U.S. at 255-56) (noting that the Supreme Court has not limited this proof requirement to § 1983 and thus applying the reasoning to all federal claims for emotional distress). The court provided that many "sister circuits have recognized that claimant's testimony alone may not be sufficient to support anything more than a nominal damage award." *Id.* (citing the Third, Sixth, Tenth, and Eleventh Circuit Courts). In essence, the court required physical manifestations and corroborating testimony by a medical or psychological expert in order to recover emotional harm. *Id.* at 938-39.

156. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 392 (2003) ("'Absent plaintiffs' might be thought of as individuals with present legally cognizable tort injury claims, and 'quasi-plaintiffs' as similarly situated individuals, harmed to some lesser degree and thus lacking legally cognizable tort injury claims.").

157. Professor Sharkey discusses "[d]iffuse harms" which she defines as "a residual category of widespread harm cases in which the harm extends beyond the individual plaintiffs and other specifically identifiable individuals." *Id.* at 400. In response to objections to punitive damages on the grounds of extraterritoriality and multiple punishments, Professor Sharkey offers a solution that would reconceptualize punitive damages as societal compensation. *Id.* at 401. She opines that such a reconception of underdeterrence damages into societal compensation damage

> would seem to survive the retributive-punishment-focused due process constraints of *State Farm* . . . [and] favor a new kind of distributive scheme that would attempt either to compensate society directly for the imposition of those harms or else to direct compensation to some proxy that would attempt to compensate categories of individuals likely harmed by a defendant's similar wrongdoing.

principles, and harm to the Rule of Law itself.

Perhaps a useful analogy is to hate crime legislation.[158] Such legislation enhances the penalty if the defendant committed the crime with certain improper motives. This legislation does not place greater weight on the victim, but rather recognizes the harm imposed on society is increased when the wrongdoer carries an improper motive. The criminal laws increasing penalties for killing police officers similarly do not value a police officer's life more than another citizen's, but rather enhance punishment based on the harm to the respect for the Rule of Law and societal safety. Criminal law takes stock of these values and translates the value into enhanced penalties. Such enhancement mechanisms in the criminal arena may serve as wiser analogies under *State Farm*'s third disparity prong than importing a cap from a comparable civil sanction and grafting that cap onto a law where Congress has not included such a cap.[159] In the context of punitive damages for civil rights violations, the damages do not value these victims more, but rather reflect the greater harm to society when defendants violate such laws.

VI. CONCLUSION

While excessive punitive damage awards give rise to legitimate concern and tort reform, a single-digit ratio test is an irrational reform as applied to civil rights cases. We should exercise caution before extinguishing access to meaningful punitive damages for those classes of cases – here civil rights – out of which the rationale for punitive damages arose. Strict adherence to a single-digit ratio between punitive damages and compensatory damages threatens to do just that. As we evaluate courts', and our own, discomfort with rigid ratios in this context, we should ask ourselves if that discomfort "spilleth over" to

Id. at 401-02. With this solution, she hopes to effectuate deterrence, fairness, and corrective justice while avoiding the now-embedded and presumed windfall to the plaintiff. *Id.* at 353-54.

158. Almost every state has passed hate crime legislation. *See* Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 548 (2003) (contending that hate crime enhancements constitute a double jeopardy violation).

159. *Compare* Williams v. ConAgra Poultry Co., 378 F.3d 790, 798 (8th Cir. 2004) (declining to extend Title VII's cap to § 1981 because "it would be inappropriate for the courts simply to extend the Title VII limitation to § 1981 cases under the guise of interpreting the Constitution" where "Congress made the implicit judgment not to limit damages in § 1981 cases."), *with* Bains LLC v. ARCO Prod. Co., 405 F.3d 764, 777 (9th Cir. 2005) (providing that, pursuant to the disparity prong analysis, the Title VII cap was the proper benchmark for punitive damages in § 1981 cases).

ratios themselves and the commodification of nonpecuniary harms.